90-115

Supreme Court, U.S.
FILED
JUN 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

MICHELLE DONIA,

Petitioner

v.

CEREBRAL PALSY COLLINGSWOOD ACTIVITY CENTER, a/k/a CEREBRAL PALSY ADULT ACTIVITY CENTER and CORDAMORE, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI

To The Supreme Court Of New Jersey

Ronald DeSimone, Esquire
(Counsel of Record)
Mark S. Guralnick, Esq.
GARBER & GURALNICK
A Professional Corp.
1288 State Highway 73
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QUESTIONS PRESENTED

Did the Supreme Court of New Jersey err in denying an interlocutory appeal to the Plaintiff from the decision of the Superior Court of New Jersey, Appellate Division, denying an interlocutory appeal from a trial court ruling fining the Plaintiffs because of the choice of adjectives used by them in certifications filed with the court aimed at alerting the court to misconduct by the Defendants?

Was interlocutory relief warranted because the lower court's ruling affected the First Amendment rights of the Plaintiff and her lawyers and thus represented an infringement upon a fundamental right?

Did the New Jersey court deny the Plaintiffs procedural and/or substantive due process by sanctioning

the Plaintiffs for the choice of words used by them in pleadings filed on the basis of their earnest information, knowledge and belief?

Was the New Jersey court's "absolutely provable" standard for pleading acts of misconduct an arbitrary and overly restrictive standard, impeding Plaintiffs' rights of free speech and due process.[1]

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[1] The parties to the proceeding in the Supreme Court of New Jersey were Michelle Donia, Plaintiff-Appellant, and Cerebral Palsy Collingswood Activity Center, a/k/a Cerebral Palsy Adult Activity Center and Cordamore Incorporated, Defendants-Respondents. Plaintiffs-Appellant was represented by Garber & Guralnick, A Professional Corporation, and Defendants-Respondents were represented by Brown & Connery, initially, and more recently by the Law Offices of F. Michael Dailey, Esquire.

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OPINIONS BELOW

The opinion of the Supreme Court of New Jersey consists only of an Order filed April 4, 1990 denying Petitioner's Motion for Leave to Appeal an Interlocutory Order (App. A). The New Jersey Supreme Court's Order thus denied an earlier Order of the Superior Court of New Jersey, Appellate Division, refusing to hear an interlocutory appeal of the trial court decision (App. B). The trial court decision consists of the November 17, 1989 Order of the Honorable Theodore Z. Davis, of the Superior Court of New Jersey, Law Division, Camden County, denying Plaintiff's Motion for Reconsideration, based on the court's Letter Opinion of October 11, 1989 sanctioning the Plaintiffs for the words used by them in their pleadings

designed to report misconduct by the Defendants (App. C).

JURISDICTION

The Order of the Supreme Court of New Jersey was filed on April 4, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. 2101(c) and under 28 U.S.C. 1331.[2]

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[2] The simple Order which the Petitioner seeks to have reviewed is not a final judgment. However, the Order does finally determine important rights at issue, namely the right of a state trial court to set limits on the choice of descriptive words to be used in pleadings and to sanction pleaders for exercising a right of free speech in court. Stated inversely, the Order finally determines the right of the Plaintiff (to plead freely and in an unfettered fashion) her argumentative position regarding misconduct by Defendants. The Order of the New

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent constitutional provisions are as follows:

United States Constitution Amendment 1

United States Constitution Amendment 5

United States Constitution Amendment 14

(Due Process Clause,

Equal Protection Clause)

New Jersey Constitution, 1947,

Article 1, Paragraph 1

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2 (Continued)

Jersey trial court, effectively affirmed by the Supreme Court of New Jersey by its refusal to hear an interlocutory appeal, is essentially a final judgment as to Plaintiff's attorneys, who signed the pleadings in question, whose writing is the actual subject matter in dispute, and who ultimately have been fined for their choice of words. The jurisdictional statute does not contain any requirement of

STATEMENT OF THE CASE

New Jersey's Civil Practice Rules governing discovery are substantially similar to those rules in other states. Each party may propound interrogatories upon the other, and the answering party must thereupon file sworn answers or objections within the time period allowed by court rule. In the instant matter, a case involving the wrongful termination of the supervisor of a facility for disabled persons, Plaintiff

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2 (continued)

finality, nor does such a limitation appear in this Court's applicable rules. Further, this Court's jurisdiction to review interlocutory orders on issues other than liability has been recognized by the decisions in U.S. v. Utah Construction and Mining Company, 384 U.S. 394 (1966) and U.S. v. Anthony Grace and Sons Inc., 384 U.S. 424 (1966).

admittedly became late in answering interrogatories propounded on her by the Defendants. Rather than attempting to resolve the matter professionaly and amicably, Defendants' lawyers filed a motion in the state civil court seeking to dismiss Plaintiff's Complaint for failure to answer interrogatories in a timely way.

Upon being served with this motion, counsel for the Plaintiff quickly made arrangements to file answers to the interrogatories. Counsel for the Defendant agreed to withdraw its motion to dismiss Plaintiff's Complaint provided that interrogatories were answered and served upon them prior to the hearing date on the motion. In reliance upon this arrangement, Plaintiffs served sworn answers to the interrogatories upon defense counsel and failed to appear at the hearing on the Motion to Dismiss.

Alarmingly, Defendants did not keep their word. They did not withdraw their Motion to Dismiss, and in fact, their Motion was heard and granted. The Superior Court of New Jersey, Law Divison, sitting in Camden County, dismissed Plaintiff's Complaint.

When Plaintiff and her counsel learned that the lawsuit was dismissed, a prompt motion was filed to reinstate the case. The Motion included the certifications signed by Plaintiff's lawyer and paralegal detailing the misrepresentations made by Defendant's attorneys that they would withdraw their Motion in exchange for service of the overdue interrogatories. Plaintiff's Motion for Reinstatement sought attorneys fees against defense counsel for what Plaintiff earnestly believed was misconduct by a member of the bar. Plaintiff's Affidavits charged that

Defendant's lawyers exercised bad faith and committed "abuse of process" and "trickery."

Responding to these charges, defense counsel craftily sidestepped the issue and filed a Cross-Motion seeking attorneys fees from the Plaintiff's counsel for using offensive words in his pleadings. In challenging the language used by Plaintiff's counsel, defense counsel accused Plaintiff's law firm of being inefficient and blasted Plaintiff's paralegal as "odd, effusive and abrasive."

Amidst this seemingly useless exchange of words, Judge Theodore Z. Davis of the Superior Court of New Jersey, Law Division, reinstated Plaintiff's lawsuit, but on October 11, 1989, issued a two-page letter Opinion condoning defense counsel's words,

disapproving of Plaintiff's counsel's words, and sanctioning the Plaintiff the sum of $750.00 (App. C). In his Opinion letter, Judge Davis purported to weigh the impact of adjectives, classifying Plaintiff's counsel's language as "lava-like" and analogizing it to an "eruption" while minimizing defense counsel's offensive words as a mere "hiss."

Judge Davis' unusual letter opinion furthermore purported to set a new standard for speech within the halls of justice. To wit, he announced that strong words like those used by Plaintiff's counsel herein "must never be offered to the Court in any certification unless absolutely provable..." In thus announcing this standard, the Lower Court implicated Plaintiff's First Amendment rights, and single-handedly altered the previous

standard for certifications which required that facts alleged in Court be done so honestly and on the basis of personal knowledge, information or belief.

Following the Court's Order of October 11, 1989 imposing sanctions, Plaintiffs filed a Motion for Reconsideration. That Motion was denied in an Order signed by Judge Davis and dated November 17, 1989 (App. C). On November 29, 1989, Plaintiff filed a Motion for Leave to Take an Interlocutory Appeal with the Superior Court of New Jersey, Appellate Division, sitting in Trenton. The Appellate Division, on December 26, 1989, per Judges Antell, Bilder and Ashbey, filed an Order denying Plaintiff's Motion for Leave to Appeal. Thereupon, Plaintiff filed a Motion with the Supreme Court of New Jersey, seeking leave to appeal the

Interlocutory Order. On April 4, 1990, the Supreme Court of New Jersey denied that Motion for an Appeal. It is from that April 4, 1990 Order that this petition for certiorari is brought.

PRESERVATION OF FEDERAL QUESTIONS BELOW

Since the initial motion for reconsideration presented to the trial court, Plaintiffs have preserved their constitutional challenges based on free speech and due process.

These federal questions were raised and preserved initially by brief filed with the trial court, then by a brief filed with the intermediary appellate court (Superior Court, Appellate Division) and then by a Brief filed with

the Supreme Court of New Jersey.[3]

The federal constitutional questions were timely and properly raised by the Plaintiff at every juncture of the prior Court proceedings. However, none of the federal constitutional questions were passed upon by any Court. At each juncture, summary orders--rather than

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[3] In fact, Point VII of the Brief presented to the Supreme Court of New Jersey was entitled "Leave to Appeal the Interlocutory Order of the Appellate Division Should Be Granted in the Interest of Justice Because of the Crucial Constitutional Questions at Stake, and in Order to Facilitate a Fair Conclusion to the Underlying Dispute." That Brief addressed the First Amendment freedoms implicated in this case, the chilling effect, the absolute privilege governing speech in courtrooms, the procedural due process issues raised under the United States Constitution, Amendments V and XIV, and the New Jersey Constitution, Article I, paragraph 1 including the procedural and substantive due process questions associated with the confiscatory result of fining Plaintiff $750.00 because of speech in a pleading.

written opinions--were entered in this case, denying the Plaintiff relief on the constitutional questions.

ARGUMENTS FOR GRANTING THE WRIT

Although the interlocutory order under appeal involves a minor issue in the procedural chronology of the subject litigation, the extraordinary decision of the New Jersey court announces a far-reaching rule with potentially catastrophic consequences. Indeed, the New Jersey Court has sanctioned an attorney because he used strong words to characterize his opponent's conduct in failing to withdraw a Motion to Dismiss. These strong words were not uttered with any bad motive, nor were they asserted with knowledge of their falsity. Indeed, the only reason that these strong words were asserted was the

strong belief held by Plaintiff's counsel that the conduct of defense counsel was harrassing and unnecessary.

Civil litigants and lawyers in New Jersey cannot live with a system that limits the language they use in court, approves of some words yet disapproves of others, and, without warning, fines parties (or their lawyers) for overstepping the unknown limits of inoffensive pleading. The right of redress in the courts implies and includes an unfettered right to plead one's case, including the integral acts and events that occur during the discovery stage of litigation. Fining those who use tough words, or announcing an extraordinary standard requiring those words to be "absolutely provable," restrains free speech, infringes upon due process, and chills the robust debate, production of evidence and

exchange of facts which the court ought necessarily to hear and consider.

I. SPEECH UTTERED IN GOOD FAITH IS ABSOLUTELY PRIVILEGED IN A COURT OF LAW

Speech, including strongly worded allegations of misconduct, is absolutely privileged in our courts of law throughout the United States. See Prosser and Keeton on Torts, 5th ed., at 816 (1984). In fact, in New Jersey, there is a strong public policy favoring free expression in the judicial system, and the doctrine of absolute immunity with respect to statements made in the course of judicial proceedings is one that is firmly established. Devlin v. Greiner, 147 N.J. Super 446, 371 A.2d 380 (1977). The immunity applies to pleadings and other papers filed with the court. Genito v. Rabinowitz, 93 N.J. Super 225, 225 A.2d 590 (App.Div. 1966); Piper v. Scher, 221

N.J. Super 54, 533 A.2d 974 (App.Div. 1987).

While issues involving an absolute privilege frequently arise in the arena of defamation law, any punishment of speech uttered in the course of litigation automatically implicates First Amendment privileges and furthermore directly affects the rights of parties seeking redress in the courts. The privilege is deeply rooted in the common law, and is likewise followed by this court and the various circuits. See, e.g. Lal v. CBS, Inc., 726 F.2d 97 (3d Cir. 1984).

Whether the New Jersey court infringed upon the Plaintiff's First Amendment privilege to plead with freedom is an issue of tremendous constitutional importance, and this court's supervisory power is required to avoid further deferral of this issue.

II. THE "ABSOLUTELY PROVABLE" STANDARD OF THE NEW JERSEY COURT LIMITS ACCESS TO THE COURT AND ARBITRARILY CONTROLS THE PRESENTATION OF EVIDENCE

In its decision letter of October 11, 1989, the New Jersey court asserted that charges of misconduct like those alleged by Plaintiff's counsel should never be made unless they are "absolutely provable." This overstated, overbroad standard runs contrary to New Jersey pleading practice. In fact, New Jersey's own Court Rule, 1:4-8, requires that an attorney signing a pleading certify that he has read the pleading, and that to the best of his knowledge, information and belief, there are good grounds to support it. There is no state rule requiring a pleading to be "absolutely provable."

Moreover, and more importantly, requiring a pleading to be absolutely

provable automatically frustrates access to the courts by forcing those who have knowledge or information about an event or an act to first prove it before pleading it. Without first proving it, no act or event could logically ever be deemed absolutely provable and thus suitable for filing. This preposterous standard announced by the New Jersey court is more than merely semantical; indeed, it controls what speech will be acceptable (as qualifying as absolutely provable), and what speech will not be acceptable.

Not only does this extraordinary standard for pleading invade free speech, but it implicates procedural and substantive due process to the extent that evidence is not proffered by those who have only information or belief to support the evidence.

No court below ever responded to

this unusual standard offered by Judge Davis at the trial level, and it continues to be the standard in the instant case.

III. THE IMPOSITION OF A $750.00 FINE FOR USING STRONG WORDS IN A PLEADING VIOLATES DUE PROCESS

The New Jersey court sanctioned the Plaintiff (and her counsel) the sum of $750.00 without ever affording a plenary hearing on the issue. No witnesses ever testified as to the allegations before the court, nor was there any oral argument ever delivered on any legal issues. The court simply approved of defense counsel's wording, but disapproved of Plaintiff's counsel's wording, and for that reason, while making no additional finding whatsoever, the court chose to sanction Plaintiff's counsel. This confiscatory action was taken in the face of both state and

federal guarantees of due process.

Even beyond the obvious procedural flaws in the court's action, principals of substantive due process were offended in this case. There simply was no reasonable relationship between the sanction of $750.00 and some legitimate state purpose. Cf. Williamson v. Lee Optical Co., 348 U.S. 482 (1955).

IV. THE NEW JERSEY COURT UNCONSTITUTIONALLY APPLIED THE LAW IN AN UNFAIR AND UNEQUAL MANNER

The New Jersey Court's letter opinion of October 11, 1989, announcing the $750.00 sanction against the Plaintiff, appears to be quite concerned with the fact that the allegations were made by one lawyer against another lawyer. The obvious inference is that lawyers have less of a right to communicate freely than do their

client/litigants. Though the due process and equal protection guarantees of the federal and state constitutions are not coterminus in their spheres of protection, equality of right is fundamental in both, and each forbids class legislation arbitrarily discriminatory against some and favoring others in like circumstances. U.S.C.A. Const. Amend. 14; N.J. Const. 1947, Art. I, par. 1. No New Jersey court has articulated any reason why the pleadings of lawyers were treated with such scrutiny and discrimination. No court has set forth any disciplinary, ethical, or regulatory basis for controlling the speech of lawyers. Hence, the New Jersey court's penalization of the Plaintiff's law firm in this case may be baseless completely. Yet even if the court could articulate some reason for regulating the speech of lawyers, apart

from the speech of other pleaders, no legitimate policy consideration or material distinction between lawyer and non-lawyer would warrant a sanction against a lawyer who pleads with strong words.

We submit that, excluding an instance in which a lawyer knowingly perjures himself in a pleading, the First, Fifth and Fourteenth Amendments give him the right to plead as softly or as vociferously as he chooses to plead, provided that he does so on the basis of his truthful knowledge, information or belief.

The questions presented in this case are of great significance in the administration of the civil justice system in the State of New Jersey, and everywhere else. The significance is doubled by the fact that no state appellate court has acted to reverse--or

even to review--this intrusion upon basic constitutional rights. The serious questions of public policy involved here and the effect of the hasty decision below, if unreversed, upon the rights of litigants and their lawyers to speak and argue freely and boldly in their pleadings before any American Court makes this case an especially appropriate one for the exercise of this court's discretionary jurisdiction.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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By: _____
RONALD DESIMONE, Esquire
Counsel of Record
A Member of the Bar of
the Supreme Court of
the United States

By: _____
MARK S. GURALNICK, Esq.

Attorneys for the Petitioner

SUPREME COURT
OF NEW JERSEY
M-949 September Term
1989

MICHELLE DONIA,
Plaintiff-Movant

31,401

vs.

ORDER

CEREBRAL PALSY
COLLINGSWOOD
ACTIVITY CENTER, et al.,
Defendants-Respondents.

FILED
APR 4 1990
(Signature)
Clerk

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Robert N. Wilnetz, Chief Justice, at Trenton, on this 30th day of march, 1990.

I certify that the foregoing is a true copy of the original on file in my office
(Signature)
Clerk of the Supreme Court
of New Jersey

(Signature)
Clerk of the
Supreme Court

APPENDIX A

AM-448-89T1

ORDER ON MOTION

MICHELLE DONIA

vs.

CEREBRAL PALSY COLLINGSWOOD ACTIVITY CENTER, ET AL.

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.
AM-448-89T1
MOTION NO.
M-1798-89
BEFORE PART: A
JUDGE(S): ANIELL
BILDER
ASHBEY

MOTION FILED: NOVEMBER 29, 1989
ANSWER(S) FILED: DECEMBER 21, 1989
BY: CEREBRAL PALSY COLLINGSWOOD ACTIVITY CENTER, ETC.
SUBMITTED TO COURT: DECEMBER 18, 1989

O R D E R

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 21st DAY OF DECEMBER, 1989, HEREBY ORDERED AS FOLLOWS:

MOTION BY	GRANTED	DENIED	OTHER
MICHELLE DONIA FOR LEAVE TO APPEAL		XX	
SUPPLEMENTAL:			

FILED
APPELLATE DIVISION
DEC 26, 1989
(Signature) Clerk

FOR THE COURT:
(Signature)
MELVIN P. ANTELL
P.J.A.D.

I hereby certify that the foregoing is a true copy of the original on file in my office
(Signature) Clerk

APPENDIX B

GARBER & GURALNICK
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(609) 722-9700
Attorneys for: Plaintiff

Plaintiff, MICHELLE DONIA	SUPERIOR COURT OF NEW JERSEY CAMDEN COUNTY
v.	Docket No. L-01525-89
Defendant CEREBRAL PALSY COLLINGSWOOD ACTIVITY CENTER, a/k/a CEREBRAL PALSY ADULT ACTIVITY CENTER And CORDAMORE INC.	CIVIL ACTION ORDER

THIS MATTER having been opened to the Court on the Motion of Mark S. Guralnick, Esquire on behalf of the firm of Garber & Guralnick, seeking reconsideration of the Court's Order sanctioning counsel for $750.00 based on their earlier Motion to Reinstatement and counsel fees, and for a stay of the imposition of that sanction,

APPENDIX C

AND the Court having reviewed and considered the Certification of Counsel and the Brief submitted in support of the Motion, together with all of the papers preceding this matter, and on the basis of oral argument,

IT IS, therefore, this 17th day of November, 1989, ORDERED that the Motion of Plaintiff's counsel for reconsideration and a stay be and hereby is DENIED.

(Signature)

THEODORE Z. DAVIS, J.S.C.

SUPERIOR COURT OF NEW JERSEY
(Seal)

Chambers of
THEODORE Z. DAVIS
Judge

Camden County Hall
of Justice
5th & Mickle
Camden, NJ 08103
Suite 540

October 11, 1989

Jane A. Lorber, Esquire
Brown & Connary
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Mark S. Guralnick, Esquire
Garber & Guralnick
First Peoples Bank Building
1288 State Highway 73
Mount Laurel, NJ 08054

Re: Donia v. Cerebral Palsy Collingswood Activity Center, et al.; Docket No. L-01525-89

Dear Counsel:

This matter started by the failure of counsel to answer interrogatories in a timely manner. R.4:17-4(b). This precipitated the imposition of sanctions under R. 4:23-5. This motion for dismissal was the requested sanction. This Court granted the motion without knowledge that there

existed some confusion on the part of counsel as to whether the movant was going to withdraw its motion. Out of this confusion there was emitted the lava-like allegations of "lying", "violations of cannons of ethics", "bad faith", "abuse of process" and "trickery". In response to this eruption, there was emitted a "hiss"; a manifestation of something relatively cool being place into juxtaposition with that which is extremely hot. In this case, the "hiss" was created by the use of words as "odd", "effusive" and "abrasive".

The former activity, even if without ill-will, was totally uncalled for, and must never be offered to the court in any certification unless absolutely provable; especially when one alleges that a colleague is unethical.

The respone to these vituperative comments were totally consistent with the level of professionalism this court expects from members of the bar, and no sanctions are warranted. The restraint shown in light of the charges is admirable.

With respect to the language used by Garber & Guralnick, and the allegations to which they refer, sanctions are warranted.

Counsel shall pay the sum of $750.00 within 10 days hereof to the firm of Brown & Connery. Brown & Connery is to submit an Order.

Cordially yours,

(Signature)

Theodore Z. Davis, J.S.C.

rb

CERTIFICATION OF SERVICE

The undersigned counsel of record on behalf of the Plaintiff-Petitioner MICHELLE DONIA hereby certifies that three true and correct copies of the Petition for Writ of Certiorari were served by First Class United States Mail, postage prepaid, upon F. Michael Dailey, Esquire, Attorney for the Defendants-Respondents, 61 Kresson Road, Cherry Hill, New Jersey 08034 by depositing them with the United States Post Office, Mount Laurel, New Jersey, on the 30th day of June 1990.

GARBER & GURALNICK
A Professional Corporation

By: _____
RONALD DESIMONE, ESQ.

By: _____
MARK S. GURALNICK, ESQ

DATED: June 30, 1990

Supreme Court, U.S.
FILED
AUG 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 90-115

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MICHELLE DONIA,

Petitioner

v.

CEREBRAL PALSY COLLINGSWOOD ACTIVITY CENTER , a/k/a/ CEREBRAL PALSY ADULT ACTIVITY CENTER AND CORDAMORE, INC.

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF NEW JERSEY

F. Michael Daily, Jr.
(Counsel of Record)
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(609) 354-0900

QUESTIONS PRESENTED

Did the Supreme Court of New Jersey err in denying an interlocutory appeal to the Plaintiff from the decision of the Superior Court of New Jersey, Appellate Division, denying an interlocutory appeal from a trial court ruling fining the Plaintiffs because of the choice of adjectives used by them in certifications filed with the court aimed at alerting the court to the misconduct by the Defendants?

Was interlocutory relief warranted because the lower court's ruling affected the First Amendment rights of the Plaintiff and her lawyers and thus represented an infringement upon a fundamental right?

Did the New Jersey court deny the Plaintiffs procedural and/or substantive due process by sanctioning the Plaintiffs

for the choice of words used by them in pleadings filed on the basis of their earnest information, knowledge and belief?

Was the New Jersey court's "absolutely provable" standard for pleading acts of misconduct an arbitrary and overly restrictive standard, impeding Plaintiffs' rights of free speech and due process.

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Appendix A:

Acknowledgement of Service signed by Mark S. Guralnick,Esquire on June 2.

Appendix B:

Motion for Reinstatement of Case, Certification of Counsel, Affidavit of Wendy Coster, Certification of Counsel Fees, prepared by Garber & Guralnick office.

Appendix C:

Certification of Jane A. Lorber In Opposition to Plaintiff's Motion for Reinstatement of the Cmplaint, In Support of Defendant's Cross Motion, with Affidavity of Cheryl Fisher and Dee Fillius, prepared by Brown & Connery office.

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NO. 90-115

IN THE SUPREME COURT OF THE UNITED STATES

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CEREBRAL PALSY COLLINGSWOOD ACTIVITY CENTER , a/k/a/ CEREBRAL PALSY ADULT ACTIVITY CENTER AND CORDAMORE, INC.

Respondents

On Petition For Writ of Certiorari to The Supreme Court of New Jersey

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Cerebral Palsy Collingswood Activity Center respectfully requests that this Court deny the petition for writ of certiorari to review the Order of the Supreme Court of New Jersey denying Petitioner's motion for leave to appeal an interlocutory order in this case and award damages to Respondent.

JURISDICTION

The Petitioner seeks to have reviewed the Order of the Supreme Court of New Jersey filed on April 4, 1990, relying on 28 U.S.C. 2101(c) and 28 U.S.C. 1331, to invoke the jurisdiction of the Court.

The Petitioner admits that the Order which she seeks to have reviewed is not a final judgment. The petitioner relies on the argumentthat the Order finally determines the right of the plaintiff to plead freely and in an unfettered fashion, thus invoking jurisdication under 28 U.S.C. 1331. Petitioner does not raise a real and substantial federal question. Since the plaintiffs constitutional claim is merely collateral to dispositive issues in the case grounded in state law this Court lacks jurisdiction.

COUNTERSTATEMENT OF FACTS

Petitioner's request for Certiorari arises out of an action involving the termination of the supervisor of a facility for disabled persons, where Plaintiff during the course of discovery admittedly became late in answering interrogatories propounded on her by the Defendants.

On April 26, 1989, Defendants served upon Plaintiff's attorney their first set of interrogatories. This was followed by a second set served on June 1, 1989. Plaintiff's attorney executed a written Acknowledgment of Service of the second set of interrogatories (App. A).

When Plaintiff failed to answer either set of interrogatories within the time periods required by New Jersey's Civil Practice Rules, the Defendants

moved to strike Plaintiff's complaint. After being served with this motion Plaintiff's attorney made arrangements to deliver answers to the first set of interrogatories but failed to provide the second set.

Defendant's motion to dismiss would only be withdrawn if answers to both sets of interrogatories were produced prior to the hearing. Accordingly, Judge Davis sitting in the Superior Court of New Jersey, Law Division, Camden County dismissed Plaintiff's complaint.

Plaintiff's attorney then filed a Motion to Reinstate the case. The Motion included Certifications signed by Plaintiff's attorney and paralegal, detailing conversations between Plaintiff's attorney's staff and Defendant's attorney's staff concerning the status of the

overdue interrogatories and possible withdrawal of the Motion to dismiss. In same, Plaintiff's attorney demanded attorney's fees against defense counsel for what he construed as misconduct by a member of the bar (App. B).

Plaintiff's Affidavits included allegations of "lying," "violations of cannons of ethics"," bad faith," "abusive process" and "trickery," relying solely on statements made by Plaintiff's attorney's paralegal detailing conversations with defendant's attorney's staff. At no time prior to making these allegations did Plaintiff's attorney actually speak to Defendant's attorney regarding the answers to interrogatories or the withdrawal of the motion to dismiss.

Plaintiff's attorney did not have personal knowledge of the facts upon which he based these most serious allegations

of misconduct. Further, there was no proof before Plaintiff's attorney that any attorney at the Defendant's law firm had actually taken part in any deceipt, trickery or unethical conduct.

In response to these unsubstantiated charges, Defendant filed a crossmotion seeking sanctions of Plaintiff's counsel including affidavits by its staff and a certification by the attorney handling pre-trial discovery setting forth confirmation of the second set of interrogatories and the request made to produce same before withdrawal of the motion (App C).

At the discretion of Judge Theodore Z. Davis of the Superior Court of New Jersey, Law Division, the Plaintiff's law suit was reinstated, but with conditions of the October 11, 1989, Opinion letter

in which he expressed his disapproval of Plaintiff's counsel's words, and sanctioned the Plaintiff's attorney in the sum of $750.00 (Pet.App.C). In this Opinion letter, Judge Davis exercised his power to insure that the proceedings in his court were conducted in such a manner as to engender respect for law and to maintain high professional standards among those associated with the administration of justice. He stated that Plaintiff's activity was totally uncalled for and "must never be offered to the court in any certification unless absolute provable especially when one alleges that a colleague is unethical."

Following the court's Order of October 11, 1989, imposing sanctions, the Plaintiff's filed a Motion for Reconsideration. That Motion was denied

in an Order signed by Judge Davis and dated November 17, 1989. The Plaintiff then filed a Motion for leave to take an Interlocutory Appeal with the Superior Court of New Jersey, Appellate Division, dated November 29, 1989. The Appellate Division on December 26, 1989, per Judges Antell, Bilder and Ashbey, filed an Order denying Plaintiff's Motion for Leave to Appeal. Subsequently, Plaintiff filed a Motion with the Supreme Court of New Jersey, seeking leave to appeal the Interlocutory Order. On April 4, 1990, the Supreme Court of New Jersey denied that Motion for an Appeal. It is from that April 14, 1990 Order that the plaintiff brings this Petition for Certiorari.

ARGUMENTS OPPOSING THE WRIT

In order to justify granting a Petition for Certiorari, it is necessary that Petitioner prove the questions presented are of sufficient significance that the Court could not ignore the impact of the Opinion as it stands. The New Jersey Court through the Opinion Letter of Judge Davis sanctioned Petitioner's attorney for the use of words and allegations viewed as intolerable and uncalled for which offended the integrity of the court and its officers. Regardless of the motive behind Petitioner's allegations, his exaggerations and reckless disregard of the truth justified the sanctions imposed.

Further, the disciplining of an attorney by a state court is an issue sacred to the state and is not one

to be interferred with by the Federal courts. To this extent the Petitioner's constitutional claim is a matter of state concern where the real party at interest is the State of New Jersey and not Respondent or its named counsel of record.

The sanctions imposed on Petitioner's attorney were entirely appropriate under the circumstances and not of such great significance to warrant this court's discretionary review.

I. PETITIONER'S CLAIM FAILS TO ARISE UNDER THE CONSTITUTION; IT IS MERELY COLLATERAL TO DISPOSITIVE ISSUES IN A CASE GROUNDED IN STATE LAW

Under 28 U.S.C. 1331, this Court's jurisdiction is restricted to claims which arise under the Constitution or laws of the United States. For sound jurisprudential reasons, this

Court recognizes that review will not be granted and original jurisdiction does not exist where Petitioner's on-stitutional claim is merely collateral to dispositive issues in a case grounded in state law and the federal issue would not be a defense to an action in state court. United Pacific Ins. Co. v. Montana Dept. Agriculture, 658 F. Supp. 335 (D.C. Mont. 1986).

In the present action, Petitioner invokes jurisdiction to review judgement of a case where the cause of action in the complaint clearly contains issues which are firmly within the confines of state law. The constitutional claims of Petitioner are unrelated to the dispositive issues of the case and thus are disqualified from this Court's review.

Because Petitioner's claim fails

to contain a cause of action which arises under the Constitution or laws of the United States, this Court lacks jurisdiction to review the case under 28 U.S.C. 1331.

II. PETITIONER FAILS TO NAME THE REAL PARTY AT INTEREST

Petitioner seeks to have reviewed a case in which her attorney was sanctioned during pre-trial proceedings. She claims her freedom of speech, due process and equal protection rights were violated by the sanctions of the trial judge. The words and allegations which prompted these sanctions were contained in a motion for reinstatement alleging misconduct by the original law firm retained by the Respondent.

The crux of Petitioner's claim as specifically stated in footnote

2, page 2 of the Writ, is a challange to "the right of a state trial court to set limits on the choice of descriptive words to be used in pleadings and to sanction pleaders for exercising the right of free speech in court." Petitioner clearly frames the issue presented to this Court but completely disregards the real party at interest, i.e., the State of New Jersey, its courts, and the trial judge, Honorable Theordore Z. Davis.

Further, neither the Respondent nor its substituted attorney has an interest in the claim presently submitted to this Court (App. D). Petitioner fails to join the real parties at interest, and improperly seeks to have reviewed a sanction imposed upon him prior to

the substitution of attorney for Respondent.[1]

Petitoner's constitutional claim stems from the order of a trial judge against her attorney and questions the authority of the New Jersey court to discipline members of its bar. It is respectfully submitted that neither Respondent nor the counsel ultimately retained for its defense are the real parties at interest. Rather, it is a matter to be determined and defended by the State of New Jersey.

III. FREEDOM OF SPEECH IS NOT ABSOLUTE AND IS SUBJECT TO CONSEQUENCES ONCE TAKEN

Petitioner does not have an absolute

---

[1] It is singificant to note that Petitioner never paid the $750.00 sanction awarded to the original counsel retained by Respondent. Additionally, the original counsel never made a demand for this payment.

unfettered right to plead his case. The right of Freedom of Speech is not absolute; it is a relative right, and if a person speaks, he takes the consequence of having spoken. NLRV v. Pick Manufacturing Co., 135 F. 2d 329 (7th Cir. 1943). Additionally, an attorney upon his admission to the bar becomes an officer of the court, subject to its rules and disciplinary action.

The New Jersey Constitution reposes in the New Jersey Supreme Court "jurisdicition over the admission to the practice of law and the discipline of persons admitted." N.J. Const., Art. VI , II , par. 3. Courts in every jurisdiction are given the power necessary to control the practice of law before them as an "incident to their broader responsibility for keeping the administration of justice and standards

of professional conduct unsullied." State v. Kavanaugh, 52 N.J. 7, 19, 243 A.2d 225, (1968).

The sanctions against the Petitioner's counsel purported to prevent burdening the court with correspondence which offends the court and undermines the integrity of its officiers. In this respect, the order of the trial judge was entirely consistent with precedent.

Petitoner asserts that the sanction in question infringes upon his rights of free speech. In State v. Gussman, 34 N.J. Super. 408, 112 A.2d 565, (App. Div. 1955), where a party was held in contempt for a letter written to the Court; on appeal, the argument of protected speech was rejected, finding that the public interest in maintaining a sufficient respect for the Court outweighed whatever free speech interest

attached to plaintiff's claim. In this opinion, the Court in part relied upon the case of Cooke v. United States, 267 U.S. 517, (1925), in which a lawyer wrote a derogatory letter to a judge and had his client deliver it to him in chambers. This Court raised no issue that the act of the lawyer was protected by the Constitution.

IV. THE IMPOSITION OF SANCTIONS ON PETITIONER'S ATTORNEY FOR RECKLESS ALLEGATIONS OF MISCONDUCT WERE ENTIRELY APPROPRIATE.

The imposition of sanctions is an authority vested in the tral judge. Initially, the Petitioner's failure to answer interrogatories alone would have warranted sanctions at the discretion of the court. Automatic Washer v. Brunswick Burl Co, 153 N.J. Super 343, 379 A. 2d 857, (1977). It was within the

power of the trial judge below to regulate the proceedings in his court.

When questioning the ethics or conduct of a colleague, an attorney must maintain the high professional standards among those concerned with the adminstration of justice. As to courtroom decorum, lawyers are required to display courteous and respectful attitude not only towards the court but towards opposing counsel, parties in the case, witnesses, court officiers, clerks, and anyone who has contact or is part of the legal process, Code of Professional Responsibility DR 7-106 (c) (6). In Re Vincente, 92 N.J. 591, 603, 458 A.2d 225 (1983).

It is further recognized by this Court and in other jurisdictions that an attorney may be disciplined for defamatory or disrespectful statements

contained in the pleadings, knowing they were false or were made with a reckless disregard of the truth Ramirez v. The State Bar, 28 Cal. 3rd 402, 169 Cal. Rptr. 206, 619 P. 2d 399 (1980). Such discipline cannot be construed as a violation of freedom of speech.

The Petitioner claims absolute immunity with respect to statements made in the course of judicial proceedings. However, such immunity is an affirmative defense to actions for libel or slander and does not insulate an attorney's statement which would have a detrimental impact upon the orderly administration of justice. Such privledge is accorded to statements with the consideration that the privledge is mitigated by the control and authority of the trial judge. Ranier's Dairies v, Raritan Valley Farms, Inc., 19 N.J. 552, 562, 117 A.2d 889 (1955). It is because

the court can execise control over attorneys and parties that the privledge in defamation suits is granted. The Petitioners claim does not have application and he is not insulated from the sanctions imposed.

The Petitioner contends that the New Jersey Court infringed upon the her freedom of speech, due process, and equal protection under the law and that the questions presented in the Petition are of great significance in the administration of civil justice system in the State of New Jersey, making it an appropriate decision to be reviewed under of the Court's discretionary jurisdiction.

However, Petitioner fails to show that the decision which stands is in conflict with either federal or state courts and does not present questions

which are so unique that they demand the attention of this Court.

V. THE PRESENT PETITION IS OF SUCH AN UNSUBSTANTIAL CHARACTER THAT RESPONDENT IS ENTITLED TO AN AWARD OF DAMAGES.

USSC R.42.2 provides that "when a Petition for a Writ of Certiorari...is frivolous, the Court may award the respondent or appellee just damages and single or double costs." See also Deming v. Carl Packing Co., 226 U.S. 102, (1912).

It is respectfully submitted that the present Petition in the context of the underlying action is absolutely frivolous. It is a transparent attempt by Petitioner's counsel to clothe a personal rebuke which he has sustained from a lower state trial court, with constitutional trappings for the obvious

purpose of personal aggrandizement.

The case which Petitioner's counsel attempts to bring before this Court, involves a private individual, Michelle Donia, suing private non profit corporations. The cause of action is grounded in state contract and tort law.

No interest of Petitioner, Michelle Donia, is being furthered by the present Petition. Certainly the fact that Petitioner's attorney may now be less inclined to refer to opposing counsel as unethical or deceitful, should not prevent him from adequately representing the interest of the Petitioner.

Notwithinstanding the fact that it is impossible to discern the interest of the client being furthered by this Petition, Petitioner plows ahead, after being rebuffed by the New Jersey Appellate Courts, with the present application,

claiming that New Jersey lawyers have a constitutional right to say anything they like so long as it is done so in Court or in a pleading. At page 13 of his brief, Petitioner's attorney claims that "lawyers in New Jersey cannot live with a system that limits the language they use in Court."

Petitioner's attorney, however, cites no law in support of this incredible proposition which is the foundation of his constitutional argument. As previously, argued, the law is clearly to the contrary. If lawyers and litigants could say whatever they wanted whenever they wanted, the administration of justice would be in a sad state.

In summary, Petitioner asserts a constitutional claim that is without legal or factual basis. It is aggravated by the fact that it is virtuely impossible

to identify a substantial interest of the Petitioner, Michelle Donia, which would be furthered, should the present Petition succeed. In spite of this, the Respondent for now the third time has been subjected to a goundless and insubstantial appeal, that is related in no respect to the issues involved in the underlying action. Being the named Respondent, it has been required to bear the accompanying burden and expense in responding to same. This Respondent respectfully requests that the Court award damages and costs pursuant to R.42.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied and costs and damages awarded the Pespondent.

Respectfully submitted,

By.....
F. Michael Daily, Jr.

CERTIFICATION OF SERVICE

The undersigned counsel of record on behalf of the Respondents, Cerebral Palsy Collingswood Activity Center, a/k/a Cerebral Palsy Adult Activity Center and Cordamore, Inc., hereby certifies that three true and correct copies of the Brief in Opposition to Petition for Writ of Certiorari were served by First Class United States Mail, postage prepaid upon Ronald Desimone, Esquire, Attorney of Record for the Plaintiff Petitioner, 1288 State Highway 73, Mount Laurel, New Jersey 08054 by depositing them with the United States Post Office, Haddonfield, New Jersey on August 10, 1990.

By.....
F. Michael Daily, Jr.
Attorney for the
respondents

Brown & Connery
360 Haddon Avenue P.O. Box 539
Westmont, NJ 08108
Attorneys for Defendants
(609) 854-8900

Plaintiff MICHAEL DONIA	:	SUPERIOR COURT OF NEW JERSEY
	:	CAMDEN COUNTY
	:	LAW DIVISION
vs.	:	DOCKET NO
Defendant CEREBRAL PALSY COLLNNGSWOOD ACTIVITY CENTER a/k/ a CEREBRAL PALSY ADULT ACTIVITY AND CORDAMORE, INC.	:	L-01525-89
	:	Civil Action
	:	Acknowledgment of Service

TO: Mark S. Guralnick

Service of the annexed Interrogatories is hereby acknowledged this 2 day of June, 19 .

(Signature)

.....

Mark S. Guralnick, Esq.

Appendix A

Garber & Guralnick
By: Mark S. Guralnick Esq.
1288 State Highway 73, Suite 200
Mount Laurel, New Jersey 08054
Attorney for Plaintiff

Plaintiff MICHAEL DONIA	:	SUPERIOR COURT OF NEW JERSEY
	:	CAMDEN COUNTY
	:	LAW DIVISION
vs.	:	DOCKET NO
Defendant CEREBRAL PALSY	:	L-01525-89
COLLNNGSWOOD	:	Civil Action
ACTIVITY CENTER a/k/ a CEREBRAL PALSY	:	
ADULT ACTIVITY AND CORDAMORE, INC.	:	ORDER

THIS MATTER having been opened to the Court on the Motion of Mark S. Guralnick, Esquire, Attorney for Plaintiff, seeking to reinstate the Complaint dismissed on August 21, 1989, and the Court having reviewed and considered the Certification of Counsel, the Affidavit

of Wendy T. Coster, the Affidavit of Counsel Fees and the Acknowledgement of Service submitted in support of said Motion,

AND, if further appearing that the Plaintiff duly answered the Defendant's Interrogatories,

And there being no good cause shown to the contrary,

IT IS, therefore, on this____day of 1989, ORDERED that the Plaintiff's Complaint be and hereby is reinstated.

IT IS FURTHER ORDERED THAT Defendant pay a counsel fee to the Plaintiff's counsel in the amount of $_____.

Theodore Z. Davis,
J.S.C.

Appendix B

Garber & Guralnick
By: Mark S. Guralnickm Esq.
1288 State Highway 73, Suite 200
Mount Laurel, New Jersey 08054
Attorney for Plaintiff

Plaintiff MICHAEL DONIA	:	SUPERIOR COURT OF NEW JERSEY
	:	CAMDEN COUNTY
	:	LAW DIVISION
vs.	:	DOCKET NO
Defendant CEREBRAL PALSY COLLNNGSWOOD ACTIVITY CENTER a/k/ a CEREBRAL PALSY ADULT ACTIVITY AND CORDAMORE, INC.	:	L-01525-89
	:	Civil Action
	:	NOTICE OF MOTION

To: Jane A. Lorber, Esq.

Take Notice that the undersigned will apply to the above named Court, at Camden County Courthouse 5th & Mickle Boulevard, Camden, NJ 08103 on September 15, 1989, at 9:00a.m. o'clock, or as soon thereafter as counsel may be heard

for an Order for reinstatement of Complaint upon the folloiwng grounds: Counsel shall rely on the annexed Certification of Counsel, Affidavit of Wendy Coster, Affidavit of Counsel Fees, and the attached Answers to Interrogatories and the Acknowledgemnt of Service signed by Defendant's law firm.

Pursuant to R.1:6-2(d), the undersigned:

( ) waives oral argument and consents to disposition on the papers.

(x) does not request oral argument at this time.

( ) requests oral argument.

A proposed form of Order is annexed.

(Signature)

.....

Mark S. Guralnick, Esq.

Appendix B

Garber & Guralnick
By: Mark S. Guralnick Esq.
1288 State Highway 73, Suite 200
Mount Laurel, New Jersey 08054
Attorney for Plaintiff

Plaintiff MICHAEL DONIA	SUPERIOR COURT OF NEW JERSEY
	CAMDEN COUNTY
	LAW DIVISION
vs.	DOCKET NO L-01525-89
Defendant CEREBRAL PALSY COLLNNGSWOOD ACTIVITY CENTER a/k/a CEREBRAL PALSY ADULT ACTIVITY AND CORDAMORE, INC.	Civil Action
	CERTIFICATION OF COUNSEL

Mark S. Guralnick, Esquire of full age, hereby certifies as follows:

1. I am an attorney at law of the State of New Jersey and I represent the Plaintiff in the above-captioned matter.

2. On August 21, 1989, it appears that the Honorable Theodore Z. Davis dismissed the Plaintiff's Complaint for failure to answer Defendant's Interrogatories.

3. The Court's Order dismissing the Complaint was an error because Plaintiff had, in fact, answered the Defendant's Interrogatories, and Defendant, either negligently or deliberately, failed to notify the Court.

4. Moreover, the Motion asking this Court to dismiss the Plaintiff's Complaint was filed vexatiously, in bad faith, unethically, and in violation of various attorney disciplinary rules, since counsel for the Defendant agreed to grant counsel for the Plaintiff an extension in which to answer the Interrogatories in this complex civil

action.

5. Specifically addressing the Motion to dismiss the plaintiff's Complaint, the Plaintiff submits that during the week immediately preceding the return date on the Motion, a paralegal from Plaintiff's attorney office contacted Defendant's counsel and made arrangements to submit answers to the Interrogatories without further delay. In those telephone communications, Plaintiff's counsel's paralegal agreed to submit the Interrogatory answers to Defendant law firm, in person, in exchange for the Defendant's counsel's agreement to withdraw the Motion.

6. I incorporate herein by reference the Affidavit of our paralegal, Wendy T. Coster, which is attached hereto.

7. Then, on or about August 17, 1989, prior to the return date of the

Motion, our paralegal personally hand-delivered the answers to Interrogaotries to the law office of Brown & Connery, representing the Defendant, and then procured the signature of one Cheryl Fisher, on behalf of Jane Lorber, Esquire, the Defendant's attorney, on an Acknowledgment of Service form. Said Acknowledgement of Service form is incorporated herein by reference as well and marked Exhibit "A".

8. Then and there, while the paralegal was hand-delivering the answers to Interrogaotries, the secretary at Brown & Connery indicated that she would take the necessary steps to withdraw the Motion to dismiss the Plaintiff's Complaint.

9. However, it appears that she

either forgot to do so, or knowingly and deliberately failed to do so in order to require the Plaintiff to undertake the instant Motion for reinstatement.

10. On August 30, 1989, I received in the mail a copy of the Order of Judge Davis, signed August 21, 1989, dismissing the Plaintiff's Complaint. This was the first time that I realized that defense counsel had failed to withdraw the Motion.

11. Immediately thereafter, I telephoned the law offices of Brown & Connery, and asked to be connected to Steven Wolschina, Esquire or Jane A. Lorber, Esquire, the two attorneys representing the Defendant. Neither of them was allegedly available to come to the phone. Thereupon, I spoke with the secretary to Mr. Wolschina,

who stated, in her own words, "I told your paralegal that we would only withdraw the Motion if you answered both sets of Interrogatories."

12. It is respectfully submitted that the quoted comment from the secretary is an outright lie and a product of her vivid imagination. Plaintiff's counsel does not now have two sets of Interrogatories propounded by the Defendant. If two sets were propounded by the Defendant, Plaintiff's counsel would be more than happy to answer them, or have them answered.

13. In the past, I have had personal telephone conversations with Jane A. Lorber, Esquire, in which we mutually agreed to grant each other extensions to answer Interrogatories, and in which I specifically agreed to answer more Interrogatories

propounded by her office than are permitted under the differentiated case management process in Camden County. Therefore, in accordance with my prior promises, this law office stands by its commitments to answer all responable Interrogatories propounded in the course of discovery in this case.

14. However, we do not now have any additional sets of Interrogatories. All Interrogatories which were ever sought to be answered by the Defendant's counsel have indeed been answered.

15. Therefore, I respectfully submit that the Motion filed by the Defendant was spurious and unnecessary, but more importantly, the failure to withdraw the Motion, after we personally hand-delivered answers to the only Interrogatories ever furnished to us

constitutes trickery, is downright unethical and unfair, and warrants sanctions against Defendant's attorney.

16. Accordingly, I am making this Certification in support of the Plaintiff's Motion for reinstatement, and I am incorporating herein the answers to Interogatories hand-delivered by us, the Acknowledgement of Service signed by defense counsel's secretary, the Affidavit of our paralegal, Wendy T. Coster, who personally delivered the Interrogatories, and our Affidavit of Counsel Fees.

17. Because of the extraordinary unfair abuse of process undertaken by Defendnat's lawyers, this Court should award reasonable attorney's fees incurred in the preparation of this Motion.

Appendix B

These statements made by me are true and correct to the best of my knowledge, information and belief, and I make this Certification recognizing that if I have willfully made any false statements, I am subject to punishment.

By: (Signature)

.....

Mark S. Guralnick, Esquire

Dated: August 31, 1989

Appendix B

Garber & Guralnick
By: Mark S. Guralnick Esq.
1288 State Highway 73, Suite 200
Mount Laurel, New Jersey 08054
Attorney for Plaintiff

Plaintiff MICHAEL DONIA	:	SUPERIOR COURT OF NEW JERSEY
	:	CAMDEN COUNTY
	:	LAW DIVISION
vs.	:	DOCKET NO
Defendant CEREBRAL PALSY COLLNNGSWOOD ACTIVITY CENTER a/k/ a CEREBRAL PALSY ADULT ACTIVITY AND CORDAMORE, INC.	:	L-01525-89
	:	Civil Action
	:	AFFIDAVIT OF WENDY T. COSTER

Wendy T. Coster, of full age, hereby deposes, upon her solemn oath, and according to law, and stated:

1. I am a paralegal with the law firm of Garber & Guralnick, a Professional Corporation, and we represent the Plaintiff in the above-captioned

matter.

2. On or about July 21, 1989, I had a conversation with defense attorney's secretary, Cheryl Fisher, regarding our answers to Interrogatories in the above-captioned matter.

3. Ms. Lorber's secretary asked me when they could receive the completed discovery matter and I replied, "in about three weeks, " since I had just started with the firm. Her reply was "that's fine, I'll diary it from three weeks after this date."

4. On or about August 1, 1989, I called Brown & Connery and asked to speak with Ms. Lorber regarding these answes to Interrogatories and other discovery requests.

5. On or about August 4, 1989, I again called Brown & Connery and

asked to speak wtih Ms. Lorber regarding the above matter and her secretary said she was not in the office at all, but she would get back tc me.

6. On or about August 4, 1989, I again called Brown & Connery and asked to speak with Ms. Lorber regarding the above matter and her secretaty said she was not in the office at all, but she would get back to me.

7. Ms. Lorber's secretary said "she will not speak with you."

8. On August 14, 1989, I once again tried to contact Ms. Lorber to state to her that we would comply with the Motion prior to it being returnable and her secretary, once again, refused to let me speak with the defense attorney.

9. On August 17, 1989, I had delivered the answers to Interrogator

& Connery c/o Jane Lorber, Esquire. See answers to Interrogatories, Exhibit "B" attached.

10. I asked the receptionist to let me speak with Mrs. Lorber and she stated her secretary would be down to take care of the matter.

11. As I handed the ansers to Interrogatories To Cheryl Fisher, secretary to Jane Lorber, Esquire, I asked her to sign the Acknowledgment of Service. See Exhibit "A" attached.

12. As we were parting, I said "I assume you will take this off the Motion list since we complied with your request." Ms. Fisher stated "Jane will take it off the list."

13. I stated, "We have complied with all discovery as stated in your Motion, and if you are not going to

take it off the list, would you please contact me at the office by 3:00p.m." Ms. Fisher relied, "Okay, I will."

14. As of 3:00p.m. I was ~~not~~ contacted by Ms. Fisher or any other representative of Defendant's law firm.

15. As a result of these communication, I instruct Plaintiff's counsel (my Boss) Mark S. Guralnick, that no respnsive papers had to be filed by us since Defendants were withdrawing their Motion insofar as the issue was moot.

These statements made by me are true and correct to the best of my knowledge, information and belief. I understand that if I have willfully made any false statements, I am subject to punishment.

(Signature)

.....

WENDY T. COSTER

Appendix B

Sworn to and subscribed
before me this 31st day of
August, 1989.
(Signature)
.....

Lisa Harding
A Notary Public of New Jersey
My Commission Expires Aug. 7, 1993

Appendix B

Garber & Guralnick
By: Mark S. Guralnick Esq.
1288 State Highway 73, Suite 200
Mount Laurel, New Jersey 08054
Attorney for Plaintiff

Plaintiff MICHAEL DONIA	:	SUPERIOR COURT OF NEW JERSEY
	:	CAMDEN COUNTY
	:	LAW DIVISION
vs.	:	DOCKET NO
Defendant	:	L-01525-89
CEREBRAL PALSY	:	
COLLNNGSWOOD	:	Civil Action
ACTIVITY CENTER a/k/	:	
a CEREBRAL PALSY	:	
ADULT ACTIVITY AND	:	AFFIDAVIT
CORDAMORE, INC.	:	OF COUNSEL
	:	FEES

STATE OF NEW JERSEY:
:SS
COUNTY OF CAMDEN :

Mark S. Guralnick, Esquire, of full age, hereby deposes upon his solemn oath and states the folloiwng:

1. I am an attorney at law of the State of New Jersey, and I represent

the Plaintiff in the above-captioned matter.

2. As a result of the defense counsel's failure to withdraw his Motion to dimiss the Plaintiff's Complaint, resulting in the unnecessary dismissal of said Complaint, I have been forced to expend at least two hours preparing the instant Motion, with the attached Certifications, Affidavits and exhibits.

3. I ordinarily charge $125.00 per hour as my rate for hourly legal services rendered, and said rate is reasonable fair under the circumstances presented herein.

4. Therefore, I am submitting this Affidavit in support of my request for counsel fees to be awarded in the amount of $250.00

These statements made by me are

true and correct to the best of my knowledge, information and belief. I understand that if I have willfully made any false statements, I am subject to punishment.

Garber & Guralnick
A Professional Corporation

By (Signature)
.....
Mark S. Guralnick,
Esquire

Sworn to and subscribed
before me this 31st day
of August, 1989.

(Signature)
.....
Notary Public
Lisa Harding
A Notary Pulbic of New Jersey
My Commision Expires Auug. 7, 1993

Appendix B

(Exhibts referred to the following certification are omitted)

Brown & Connery
360 Haddon Avenue P.O. Box 539
Westmont, NJ 08108
Attorneys for Defendants
(609) 854-8900

Plaintiff MICHAEL DONIA	SUPERIOR COURT OF NEW JERSEY
	CAMDEN COUNTY
	LAW DIVISION
vs.	DOCKET NO
Defendant CEREBRAL PALSY COLLNNGSWOOD ACTIVITY CENTER a/k/a CEREBRAL PALSY ADULT ACTIVITY AND CORDAMORE, INC.	L-01525-89
	Civil Action
	CERTIFICATION OF JANE A. LORBER IN OPPOSITION TO PLAINTIFF'S MOTION FOR REINSTATEMENT OF THE THE COMPLAINT, IN SUPPORT OF DEFENDANT'S CROSS MOTION FOR COUNSEL FEES AND OTHER APPROPRIATE RELIEF

Jane A. Lorber, certifies as follows:

Appendix C

1. I am an attorney at law, associated with the law firm of Brown and Connery, attorneys for defendants Cerebral Palsy Activity Center and Cordamore, Inc., in the above captioned matter. I am admitted to practice law in the State of New Jersey and am fully familiar with the facts set forth herein.

2. I make and respectfully submit this Certification on behalf of defendant's Cerebral Palsy Collingswood Activity Center and Cordamore, Inc., in opposition to plaintiff's motion to reinstate the Complaint, in support of defendants' cross motion for counsel fees and other appropriate relief.

3. The procedural history of this motion is as follows: The first set of interrogatories were served

upon plaintiff's attorney on April 26, 1989 (Exhibit "A") and answered almost four months later on August 17, 1989 (Exhibit "B"). With plaintiff's counsel's consent (Exhibit "C") defendants' second set of interrogatories were forwarded to plaintiff's counsel on June 1, 1989 (Exhibit "D"). Plaintiff's counsel signed an Acknowledgment of Service evidencing receipt of these second set of Interrogatories (Exhibit "E"). The answers thereto were due on or about August 1, 1989.

4. Not receiving answers to those second set of Interrogatories, I called Mr. Guralnick on August 1, 1989, to discuss the matter with him. He was unavailable. I left a message for him to return my call. Mr. Guralnick did not return my call. Instead, Mr.

Guralnick's ~~paralegal~~ called my secretary to leave a message with her that answers would be completed within two weeks.

5. Since my efforts to speak with Mr. Guralnick were unsuccessful, upon receipt of the paralegal's message, I asked my secretary to call plaintiff's attorney's paralegal back and advise her that defendants' attorney would not consent to a two week extrension and that if answers were not received by Friday, August 4, 1989, defendants would move before the Court for appropriate relief.

6. To date, answers have not been received to the second set of interrogatories.

7. All of the above referenced facts regarding defendants' second set of interrogatories were set forth

in defendants' attorney's certification in support of defendants' original notice of motion to strike plaintiff's Complaint for failure to answer interrogatories which was hand delivered to plaintiff's attorneys office on the same date it was filed with the Court. (Exhibit "F" at paragraph 5, 6 & 7).

8. Prior to the filing of the instant motion, defendants would have been willing to consent to reinstatement of plaintiff's Complaint upon the receipt of answers to defendants' second set of Interrogatories.

9. Curiously, in paragraph 12, 14 and 15 of Mr. Guralnick's Certification in support of the instant motion, he contends that only one set of Interrogatories were propounded by plaintiff.

"Plaintiff's counsel does not now

have two sets of Interrogatories propounded by the defendants. If two sets were propounded by the defendant, plaintiff's counsel would be more than happy to answer them, or have them answered."

(Certification of Mark S. Guralnick at paragraph 12: Exhibit "G")

Furthermore, Mr. Guralnick certifies:

"However, we do not now have any additonal sets of Interrogatories. All interrogatories which were ever sought to be answered by the defendants' counsel have indeed been answered."

(Certification of Mark S. Guralnick at paragraph 14: Exhibit "G").

Finally, Mr. Guralnick certifies:

"...the failure to withdraw the motion, after we personally hand-delivered answers to the only interrogatories ever furnished to us constitutes trickery, is downright unethical and unfair, and warrants sanctions against defendants' attorneys."

(Certification of Mark S. Guralnick at Paragraph 16: Exhibit "G").

10. Answers to only the first set of interrogatories were received

by this office on August 17, 1989, for which an Acknowledgment of Service was immediately executed by this office. (Exhibit "A" attached to Certification of Mark S. Guralnick in support of instant motion).

11. The defendants' motion to dismiss plaintiff's Complained was based upon plaintiff's failure to answer both set of interrogatories. (Exhibit "F" at paragraph 5,6, & 7). The instant motion evidences plaintiff's attorney's failure to ever attempt to contact defendants' attorney to discuss the matter and plaintiff's attorney's failure to read defendants' motion to dismiss his client's Complaint.

12. As Mr. Guralnick admits, the only time he ever personally attempted to speak with defense counel with regard

to these interrogatories was on August 30, 1989, late in the afternoon, after he received the Order from the Honorable Theodore Z. Davis granting defendants' motion to dismiss the Complaint for failure to answer interrogatories. Since I had left the office for the day, I called Mr. Guralnick back the very next morning at both 8:30a.m. and 9:00a.m. and left a message for him to call me. He never returned these calls.

13. It is respectfully submitted that Mr. Guralnicks's statements to this Court regarding this August 30, 1989 phone call to this office that neither of the two attorneys from Brown and Connery representing the defendants were "~~allegedly~~ available to come to the phone" on Wednesday, August 30,

1989 (Certification of Mark S. Guralnick in support of instant motion at paragraph 11) does not justify an inference of non-cooperation in the part of defense counsel especially in light of the fact that I called him back first thing the very next morning.

14. Mr. Guralnick frustrated all of my attempts to speak directly with him regarding these interrogatories. Instead, all of my phone calls, if returned at all, were returned by Mr. Guralnick's paralegal to my secretary.

15. While Mr. Guralnick's paralegal apparently told Mr. Guralnick that she "agreed to submit the interrogatory answers to defendant law firm, in person, in exchange for the defendants' counsel's agreement to withdraw the Motion", it is respectfully submitted that neither

defense counsel nor defense counsel's office staff ever rentered into any such agreement in exchange for the submission of only one set of intergatories, and never, at any time agreed to wtihdraw its motion, or forego filing it, upon receipt of plaintiff's answers to only one set of interrogatories.

16. No one from the office of Brown and Connery ever told Mr. Guralnick or Mr. Guralnick's paralegal, secretary, messenger or any other non-lawyer whom Mr. Guralnick uses to communicate with other lawyers, that defendants would withdraw their motion upon receipt of only one set of interrogatories. Rather, this office consistently indicated in its papers, told Mr. Guralnick's paralegal, and would have told Mr. Guralnick personally if he had every been available,

at defendants required answers to
th sets of interrogatories before
e return date of defendant's motion
order for defendants to withdraw
.

I certify that the foregoing statements
de by me are true. I am aware that
f any of the foregoing statements
de by me are wilfully false, I am
ubject to punishment.

ated: September 8, 1989

(Signature)

.....

Jane A. Lorber

Appendix C

BEST AVAILABLE COPY

Brown & Connery
360 Haddon Avenue P.O. Box 539
Westmont, NJ 08108
Attorneys for Defendants
(609) 854-8900

Plaintiff MICHAEL DONIA	:	SUPERIOR COURT OF NEW JERSEY
	:	CAMDEN COUNTY
	:	LAW DIVISION
vs.	:	DOCKET NO
Defendant CEREBRAL PALSY	:	L-01525-89
COLLNNGSWOOD	:	Civil Action
ACTIVITY CENTER a/k/ a CEREBRAL PALSY	:	AFFIDAVIT
ADULT ACTIVITY AND CORDAMORE, INC.	:	OF CHERYL A. FISHER

CHERYL A. FISHER, of full age, hereby deposes, under her solemn oath, and according to law, states:

1. I am a secretary at the law firm of Brown and Connery, attorneys for the defendants in the above captioned matter. I am secretary for attorneys

Steven G. Wolschina and Jane A. Lorber.

2. At no time whatsoever during any of the events surrounding defendants' counsel's attempts to obtain answers to its interrogatories did I ever indicate that defense counsel would withdraw its motion to dismiss plaintiff's Complaint for failure to answer interrogatories upon receipt of only one set of answers to interrogatories.

3. I signed the Acknowledgement of Service on August 17, 1989 evidencing receipt of only one set of plaintiff's answers to defendants' Interrogatories.

4. When Mr. Guralnick's paralegal delivered the interrogatories to this office on August 17, 1989, and requested that I withdraw the motion, I again told her that Jane A. Lorber, one of the attorney's for whom I work, would

withdraw the motion only if the second set of interrogatories were also answered. I asked her if both sets of interrogatories were enclosed in the envelope she had given me. She replied that the motion only required answers to the first set of interrogatories and not the second set of interrogatories. In accordance with my earlier telephone conversation with her, I again told her that the motion requested answers to both sets of interrogatories and that I did not believe that Ms. Lorber would withdraw the motion since both sets were not answered. The paralegal again stated that the interrogtories were satisfactory and that the motion should be withdrawn. I asked her when the second set of interrrogatories

would be answered and walked out of our office.

5. The paralegal was quite aware of the existence of the second set of interrogatories.

6. The only agreements I ever made with plaintiff's attorney's paralegal were that defense attorney would not file its motion to dismiss plaintiff's Complaint if both sets of interrogatory answers were received by August 4, 1989, and thereafter, that defense attorney would withdraw its motion to dismiss plaintiff's Complaint if both sets of interrogatories were received prior to the return date of the Motion. Answers to the second set of interrogatories have not been received.

7. Plaintiff's attorney never called this office prior to the return

date of the motion.

8. On only one occasion did plaintiff's attorney's ~~paralegal~~ call and ask to speak with Ms. Lorber. On that one occasion, Ms. Lorber was in a meeting and I took the message that plaintiff's paralegal would have the answers to the interrogatories to us prior to the return date of the motion. The paralegal did not request that Ms. Lorber return her call.

9. On every other occasion that plaintiff's attorney's paralegal called this office, she specifically asked for Ms. Lorber's secretary and accordingly I was the one who spoke with plaintiff's attorney's paralegal.

(Signature)
.....
Cheryl A. Fisher

Appendix C

Sworn to and subscribed
before me this 8th day of
September, 1989.

(Signature)
.....
Kathryn E. Kennell
Notary Public of New Jersey
My Commision Expires 4/18/90

Appendix C

Brown & Connery
360 Haddon Avenue P.O. Box 539
Westmont, NJ 08108
Attorneys for Defendants
(609) 854-8900

Plaintiff MICHAEL DONIA	:	SUPERIOR COURT OF NEW JERSEY
	:	CAMDEN COUNTY
	:	LAW DIVISION
vs.	:	DOCKET NO
Defendant CEREBRAL PALSY COLLNNGSWOOD ACTIVITY CENTER a/k/ a CEREBRAL PALSY ADULT ACTIVITY AND CORDAMORE, INC.	:	L-01525-89
	:	Civil Action
	:	AFFIDAVIT OF DEE FILLIUS

DEE FILLIUS, of full age, hereby deposes, under her solemn oath, and according to law, states:

1. On August 17, 1989, I sat as the receptionist for the law firm of Brown & Connery, attorneys for the defendants in the above captioned matter.

Appendix C

The receptionist greets visitors to our office.

2. A woman came in our office in order to drop off papers. Her manner was particularly odd. She came into this office and interacted with secretary Fisher in a most effusive and abrasive manner. Her manner and the tone of her voice caused me to pay prticular attention to the conversation.

3. Despite the woman's great protestations to have Ms. Fisher withdraw a motion, I heard Ms. Fisher state that Ms. Lorber was expecting both sets of answers to interrogatories. Ms. Fisher did not consent or consent on behalf of Ms. Lorber to withdraw the motion. Thereafter, the woman stormed out of our office.

Appendix C

Sworn to and subscribed
before me this 8th day of
September, 1989.

(Signature)
.....
Kathryn E. Kennell
Notary Public of New Jersey
My Commision Expires 4/18/90

Appendix C

Brown & Connery
360 Haddon Avenue P.O. Box 539
Westmont, NJ 08108
Attorneys for Defendants
(609) 854-8900

FILED NOV 27, 1989, CLERK SUPERIOR COURT

Plaintiff MICHAEL DONIA	:	SUPERIOR COURT OF NEW JERSEY
	:	CAMDEN COUNTY
	:	LAW DIVISION
vs.	:	DOCKET NO
Defendant CEREBRAL PALSY COLLNNGSWOOD ACTIVITY CENTER a/k/ a CEREBRAL PALSY ADULT ACTIVITY AND CORDAMORE, INC.	:	L-01525-89
	:	Civil Action
	:	SUBSTITUTION OF ATTORNEY

The undersigned hereby consent to the substitution of F. Michael Daily,

Jr., as Attorney(s) for the Defendants

in the above entitled cause.

Dated: November 13, 1990.

F. Michael Daily, Jr.
(Signature)
.....
Superseding Attorney

Brown & Connery
(Singature)
.....
Steven G. Wolschina, Esq.
Withdrawing Attorney

Appendix D